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No. 94-843

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

ELIZABETH RIDGEWAY, *et al.*,

Petitioners,

—v.—

PFIZER INC, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

David Klingsberg
Counsel of Record
KAYE, SCHOLER, FIERMAN,
HAYS & HANDLER
425 Park Avenue
New York, New York 10022
(212) 836-8000

Attorneys for Respondents Pfizer Inc and Shiley Incorporated

Of Counsel:

James R. Adams
FROST & JACOBS
201 East Fifth Street
Cincinnati, Ohio 45202
(513) 651-6800

7/19

QUESTIONS PRESENTED

Should this Court grant review where the petition for certiorari substantially repeats the arguments petitioners raised in their previous petition for certiorari in this case (No. 93-1912), which this Court denied on October 3, 1994, *Ridgeway v. Pfizer, Inc.*, 115 S. Ct. 294 (1994)—particularly where, following denial of certiorari, the district court has begun implementing the settlement desired by the class representatives and the overwhelming majority of the class?

Did the Court of Appeals err in dismissing for lack of standing petitioners' appeal from an order denying their motion under Fed. R. Civ. P. 60(b) to vacate a judgment finding a class action settlement to be fair, adequate and reasonable, where:

- the petitioners had previously appealed from that judgment, their previous appeal was dismissed for lack of standing, and certiorari was denied by this Court;
- petitioners' appeal from the denial of their motion to vacate the judgment is a stratagem to overcome their lack of standing to appeal the judgment directly;
- the petitioners are non-party class members who deliberately chose to join the settlement class after studying the settlement terms, rather than exercise their opportunity to opt out and pursue their long-standing action pending in another court;
- petitioners neglected to file a motion to intervene until after they had already filed their first notice of appeal, which divested the district court of jurisdiction to consider that motion; and
- after dismissal of petitioners' first appeal, the district court denied petitioners' motion to intervene

because the class would be prejudiced by any further delay in implementing the settlement, and no appeal from that order was taken?

Have petitioners' numerous, and in some instances untimely, filings in all three levels of the federal courts created a procedural context peculiar to this case which makes it unsuitable for review by this Court?

RULE 29.1 LISTING

Respondent Shiley Incorporated is a wholly-owned subsidiary of respondent Pfizer Inc. Shiley Incorporated has no subsidiaries that are not wholly owned.

Respondent Pfizer Inc has no parent company. The following is a list of its direct or indirect subsidiaries (except those that are wholly owned):

Subsidiary	*Place of Incorporation*
Pfizer Biogal L.L.C.	Hungary
Pfizer Egypt S.A.E.	Egypt
Pfizer Limited	Ghana
Pfizer Limited	India
Dumex Limited	India
Duchem Laboratories Limited	India
PT Pfizer Indonesia	Indonesia
Livestock Feeds PLC	Nigeria
Pfizer Products PLC	Nigeria
Pfizer Laboratories Limited	Pakistan
Pfizer Korea Limited	South Korea
Pfizer Pharmaceuticals Ltd.	People's Republic of China

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

The Petition for a Writ of Certiorari raises the same purported issue as petitioners' previous petition for certiorari in this case (No. 93-1912), which was denied by this Court on October 3, 1994. *Ridgeway v. Pfizer, Inc.*, 115 S. Ct. 294 (1994). Now that petitioners' four separate appeals have been dismissed or summarily rejected on the merits and their prior petition for certiorari has been denied, implementation of the class settlement has begun. The time has come to put an end to this litigation.

The first petition for certiorari sought review of a Court of Appeals decision dismissing, for lack of appellate standing, petitioners' appeal from a judgment approving a class settlement. The Court of Appeals dismissed that appeal based on

settled principles of appellate standing established by this Court and consistently applied by the Courts of Appeals, and this Court denied certiorari.

Because they lacked standing to appeal from the judgment directly, petitioners sought to appeal from an order refusing to vacate that same judgment. The Court of Appeals dismissed that appeal for lack of standing as well, and the latest petition for certiorari seeks review of that determination.

The new petition should be denied as the last one was. Petitioners are non-party class members who passed up repeated opportunities to exclude themselves from the class and pursue their own action pending against the defendants in state court. They never became parties to the litigation: they did not move to intervene in the district court until after they had already filed a notice of appeal and had thereby divested the district court of jurisdiction. And after the district court regained jurisdiction and denied petitioners' untimely intervention motion, petitioners failed to appeal from that denial.

If petitioners had made a timely motion to intervene and intervention had been granted, the question of standing to appeal would not have arisen. On the other hand, if a timely motion to intervene had been denied, appellate standing could have been assessed in light of the district court's reasons for denying intervention.

Petitioners' actions have created a unique procedural setting that is unlikely ever to be repeated, rendering this case unsuitable for review by this Court. In addition, justice would not be served by interrupting at this late stage the delivery of health care and monetary benefits to the thousands of class members who need and want them. Certiorari should be denied.

ADDITIONAL OPINIONS BELOW

The decision of the district court, from which appeal was taken, appears in petitioners' appendix at 5a. The district court's initial opinion on petitioners' Rule 60(b) motion is reproduced in the appendix hereto at 5a.

STATUTES AND RULES INVOLVED

The petition involves the following rules: Rules 23, 24 and 60(b) of the Federal Rules of Civil Procedure and Rule 3 of the Federal Rules of Appellate procedure. The pertinent provisions of these rules are set forth in the appendix hereto.

STATEMENT OF THE CASE

This class action was settled on terms satisfactory to the defendants, the class representatives and the overwhelming majority of class members. Following denial of petitioners' prior certiorari petition, the district court has begun implementing the settlement, bringing health care and monetary benefits to tens of thousands of class members who desire them.

Petitioners' efforts to overturn the settlement have cluttered every level of the federal courts with meritless filings. Petitioners filed post-appeal motions to intervene in the district court (and a motion for reconsideration of the denial of intervention), a motion in the district court to vacate the judgment under Rule 60(b), four separate appeals (all of which were dismissed or summarily rejected on the merits), and two petitions for certiorari.

Of some 50,000 class members, only the three petitioners seek to overturn the settlement. The other class members are satisfied. Yet petitioners had full opportunity to exclude themselves from the class *after* they studied the settlement terms. They chose to remain class members. Then, after the district

court entered a judgment approving the settlement as fair, adequate and reasonable, they filed a notice of appeal. The Court of Appeals dismissed the appeal on the ground that petitioners—having failed to become parties by intervening in the district court—lacked standing to appeal. This Court denied certiorari on October 3, 1994.

Seeking to circumvent the Court of Appeals' determination that they lacked standing to appeal the judgment approving the settlement, petitioners then tried to appeal from a district court order refusing to vacate the judgment approving the settlement. Petitioners' latest petition for certiorari is from the Court of Appeals' judgment dismissing that appeal.

The Class Action Settlement

This action was brought on April 19, 1991 on behalf of recipients of a Shiley artificial heart valve, and their spouses. Artificial heart valves, made of metal and synthetic materials, are surgically implanted to replace diseased and failing human heart valves. Respondent Shiley was a pioneer in developing artificial heart valves, which have saved tens of thousands of lives.

The artificial heart valves implanted in the class members continue to function as expected to sustain their lives without adverse incident. The class members' claims are *not* based upon any failure or malfunction of their valves, but solely upon their alleged concern about the small chance of malfunction sometime in the future. At the time the action was settled, such claims—to recover for alleged anxiety about a working device—had been rejected as a matter of law by some 27 courts around the country, including the Courts of Appeals for the Third, Fourth, Fifth, Eighth and Ninth Circuits. *Bowling v. Pfizer, Inc.*, 143 F.R.D. 141, 147, 162-63, 165 (S.D. Ohio 1992).[1] The class settlement provides not only

[1] As the district court observed, "[o]ne California court allowed the plaintiff with a properly functioning heart valve past the summary

cash payments, but also medical and health benefits which the overwhelming majority of class members—many of whom are aged and ill from underlying heart disease—desire to receive.

Settlement negotiations between defendants and the class representatives began in July 1991, and culminated in the execution of an agreement on January 23, 1992. (Record ("R.") 48, attachment).[2] As authorized by Fed. R. Civ. P. 23(c)(1), the district court then conditionally certified the class for purposes of settlement.[3] (R. 43). Pursuant to Fed. R. Civ. P. 23(c)(2) and (e), the court approved the notice of the settlement to be provided to class members.[4] (R. 44). At a cost of

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judgment stage of litigation, based on a fraud theory." *Bowling*, 143 F.R.D. at 147.

Although many of the cases were dismissed, artificial heart valve litigation around the country and related publicity generated "an increasing number of critical news stories and reports." *Id.* As a result, "voluminous information" about the valve was available to class counsel. *Id.* at 161.

[2] Citations to the record are to the district court docket numbers. Contrary to the petition (Pet. at 3), important terms of the settlement had not yet been negotiated at the time of the November 19, 1991 court conference. (R. 33). The district court sealed the transcript "because news of the settlement negotiations might have had ramifications on Pfizer's publicly traded stock"; and the district court found petitioners' allegations to the contrary—repeated in the petition (Pet. at 3-4)—to be "specious." *Bowling*, 143 F.R.D. at 156.

[3] Fed. R. Civ. P. 23(c)(1) provides that an order certifying a class action "may be conditional."

Petitioners state that the conditionally certified class was broader than that alleged in the original complaint. (Pet. at 4). They fail to mention that the complaint was amended to allege the broader class. (R. 47).

[4] Fed. R. Civ. P. 23(c)(2) provides that "the court shall direct to the members of the class the best notice practicable under the circumstances" which "shall advise each member that (A) the court will exclude the member from the class if the member so requests . . .; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if the member desires, enter an appearance through counsel." Fed. R. Civ. P. 23(e) provides that "notice of [a] proposed dismissal or com-

some $4 million, notice was mailed to every valve recipient for whom an address was known and was published in over 200 leading publications throughout the world. (R. 162, Pines Affidavit Exs. A, B; R. 202 at 26). The notice informed each class member of the opportunity to opt out of the class. (R. 44, Exs. A, B).

The three petitioners—two valve recipients and one spouse—are the named plaintiffs in an uncertified class action filed in 1986 against the defendants in the Pennsylvania Court of Common Pleas (*Taylor v. Shiley, Inc.*, No. 2087). In February 1992, petitioners received notice of the class settlement in this case through their counsel, and were thus expressly informed of their opportunity to exclude themselves from the class. Notwithstanding the fact that they had their own pending case against defendants, they elected to remain in the class. *Bowling v. Pfizer, Inc.*, 143 F.R.D. 141, 155-56 (S.D. Ohio 1992).

Petitioners state that if they "opted out of the *Bowling* class, they couldn't object to class certification, the *Bowling* settlement, or participate in the Fairness Hearing . . . ." (Pet. 5). This is untrue. On May 19, 1992, before the opt out deadline, the district court told petitioners that they were free to opt out and also press their objections to the settlement. (R. 140 at 28; R. 202 at 8). As the district court stated in its opinion, petitioners' counsel "was free to have opted its clients out, and then could have voiced its objections to the proposed settlement at the fairness hearing." *Bowling*, 143 F.R.D. at 156. Petitioners turned this opportunity down, as well as two other opportunities—on June 9 and July 22, 1992—to opt out *after* they had appeared and objected to the settlement. (R. 208 at 92-95; R. 251 at 82-83).

Pursuant to Fed. R. Civ. P. 23(e), the district court conducted a fairness hearing on the proposed settlement on June

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promise shall be given to all members of the class in such manner as the court directs."

5, 8, 9 and July 22, 1992. Petitioners, other class members and consumer advocacy groups were heard at length. As a result of suggestions by the court and counsel, the initial settlement agreement was substantially enhanced. Except for petitioners, all class members who were represented by counsel then withdrew their objections. Consumer advocate *amici* also withdrew their objections in view of the enhancements. (*See* R. 251 at 56-61).

On August 19, 1992, the district court issued a 68-page order finding that the settlement is "fair, adequate and reasonable." *Bowling*, 143 F.R.D. at 170. Judgment was entered on September 10, 1992. (R. 255). Petitioners filed a notice of appeal from that judgment on September 17, 1992. (R. 258). At no time prior to their filing of a notice of appeal did petitioners move to intervene.

The three petitioners were the *only* class members who continued to express dissatisfaction with the judgment approving the settlement.[5] Yet petitioners did not ask any court to relieve them personally from that judgment. Instead, petitioners—who represent no one but themselves—sought to *overturn* the judgment that tens of thousands of their fellow class members desire.

Petitioners' Four Appeals, Prior Certiorari Petition and Post-Appeal Motions

On September 25, 1992, eight days after they had filed their first notice of appeal, petitioners belatedly filed a motion in the district court to intervene for purposes of appeal. (R. 265). By memorandum decision dated November 9, 1992, the district court concluded that it could not decide the motion to intervene because the filing of the notice of appeal had

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[5] Although at times petitioners have purported to speak on behalf of all members of the uncertified class in *Taylor*, their petition for certiorari is brought solely on their own behalf and not on behalf of the uncertified *Taylor* class.

divested it of jurisdiction. (R. 297). Petitioners appealed from that decision as well. (R. 305).

On March 2, 1993, while the above appeals were pending, petitioners filed a motion to vacate the judgment pursuant to Fed. R. Civ. P. 60(b)(2), (3) and (6). (R. 315). By Order dated March 26, 1993, the district court examined each of the asserted grounds for the Rule 60(b) motion and concluded that there was no basis for it to request a remand from the Court of Appeals. (App. at 5a). The court held that some of the matters raised in the motion "were already considered" in approving the settlement; "[m]any of the 'newly discovered' matters . . . were actually known by [petitioners], or with reasonable diligence could have been discovered at the time of the fairness hearing"; and "[w]hen th[e] Court held its fairness hearing, [it] was well aware that some Plaintiffs' counsel had accused the Defendants of fraud" and it took this accusation into account when it approved the settlement. (App. at 9a-11a). Petitioners appealed. (R. 337). On June 9, 1993, the Sixth Circuit dismissed that appeal because the district court's order declining to request a remand from the Court of Appeals was not an appealable order.

On December 21, 1993, the Sixth Circuit affirmed the district court's order concluding that it lacked jurisdiction to rule on a motion to intervene filed in the district court after a notice of appeal. Petitioners did not seek certiorari with respect to that decision.

Also on December 21, 1993, the Court of Appeals issued an order dismissing petitioners' appeal from the judgment approving the class settlement. The Court held that because the petitioners "are unnamed class members who neglected to intervene in the proceedings below, they lack standing to pursue this appeal." (Pet. App. at 7a). In support of its decision, the Court cited *Guthrie v. Evans*, 815 F.2d 626, 627-28 (11th Cir. 1987), *Croyden Associates v. Alleco, Inc.*, 969 F.2d 675, 678-79 (8th Cir. 1992), *cert. denied*, 113 S. Ct. 1251 (1993),

and *Walker v. City of Mesquite*, 858 F.2d 1071, 1073-75 (5th Cir. 1988)—all of which held that non-party class members do not have standing to appeal. On March 4, 1994, the Court of Appeals denied a petition for rehearing *en banc*.

Petitioners then filed a petition for certiorari. This Court denied certiorari on October 3, 1994. *Ridgeway v. Pfizer, Inc.*, 115 S. Ct. 294 (1994).

After the petitioners' appeal was dismissed and the district court regained jurisdiction, it ruled on the pending motions. On April 5, 1994, the court denied the motion to intervene "because of the substantial delay between approval of the settlement and return of this case to this Court, and the fact that intervention at this point would be prejudicial to the class." (Pet. App. at 6a). Petitioners did not appeal from that order. Instead, on April 13, 1994, they filed a motion in the district court under Fed. R. Civ. P. 59(e) for reconsideration of the denial of their motion to intervene. (R. 371).

On April 12, 1994, the district court denied petitioners Rule 60(b) motion. The Court stated: "We have now thoroughly *re*considered our decision approving this settlement and conclude that after careful review of the Objectors' motion, and further review of our thorough 68 page Order approving the settlement, we hereby conclude that the interest of justice dictates that the Objectors' motion [under Rule 60(b)] be, and is, hereby DENIED." (Pet. App. at 5a).

On May 3, 1994, petitioners filed an appeal from the district court's denial of their motion to vacate the judgment. (R. 379). Having previously ruled that petitioners lacked standing to appeal from that same judgment, the Court of Appeals issued an order on May 17, 1994 requiring petitioners to show cause why the appeal should not be dismissed. (Pet. App. at 3a). Petitioners then moved the Court of Appeals to stay the appeal and remand to the district court for a ruling on their motion for reconsideration of the denial of their motion to intervene.

On August 8, 1994, the Court of Appeals issued the order, for which certiorari is now sought, which dismissed the appeal from the denial of petitioners' motion to vacate the judgment. The Court reasoned that because petitioners were non-party class members whose motion to intervene had been denied, they lacked standing to appeal from the denial of a motion seeking "to vacate the very settlement as to which this court earlier concluded the [petitioners] lacked standing to challenge." Petitioners' motion for a remand was denied as moot.

On November 23, 1994, the district court denied the petitioners' motion for reconsideration of the denial of their motion to intervene, holding that "[t]o postpone the benefits of the settlement for another round of appeals would . . . be prejudicial to the members of the class." (App. at 18a). The court explained:

> "*Certiorari* has been denied, all appeals have been exhausted and the judgment of this Court approving the settlement is final. The parties . . . are moving toward the implementation of the settlement and the class members will soon begin to enjoy the benefits of their lawsuit. The [petitioners] ha[ve] delayed the implementation of the settlement for over two years with their series of appeals. . . . The admitted aim of the [petitioners'] motions is to be allowed to intervene in order to file another round of appeals, which would again significantly delay the implementation of the settlement. The [petitioners] ha[ve] had an opportunity to make their objections to the settlement and those objections have been carefully considered. It is time now for the implementation of the settlement for the benefit of the Plaintiffs' Class. The tens of thousands of class members who are waiting for the settlement's benefits have waited long enough." (App. at 14a-15a).

In addition, the district court again addressed the "inflammatory accusations" in petitioners' Rule 60(b) motion, noting that "we have heard many of these arguments before from [petitioners], others are based on the [petitioners'] continued misunderstanding of the details of the settlement, and some are based on 'new evidence' which in fact was brought forward by the parties and considered by the Court in the process of approving the settlement." (App. at 21a).

REASONS FOR DENYING THE WRIT

I. THIS COURT'S DENIAL OF PETITIONERS' FIRST PETITION FOR CERTIORARI AND THE SUBSEQUENT IMPLEMENTATION OF THE SETTLEMENT REQUIRE THAT, IN THE INTEREST OF FINALITY, CERTIORARI BE DENIED.

The petition for writ of certiorari is little more than a reiteration, often *verbatim*, of petitioners' previous certiorari petition (No. 93-1912), which this Court denied. *Ridgeway v. Pfizer, Inc.*, 115 S. Ct. 294 (1994). For example, the latest petition contains the same meritless contention that there is a "split" among the circuits as to the appellate standing of non-party class members; it relies on the substantially the same cases; it makes the same policy arguments; and it asserts the same supposed "due process" violations. The tables of contents in the two petitions are virtually identical.

Petitioners should not be permitted to raise the same issues again and again in repetitive certiorari petitions in the same case. After this Court denied the first petition for certiorari, the district court began implementing the settlement. If the thousands of class members are to receive the substantial medical and monetary benefits that are due them, litigation must finally come to an end. Certiorari should be denied for this reason alone.

Nonetheless, because petitioners reiterate the arguments they raised in their first petition, we reiterate below, for the Court's convenience, our responses to those arguments.

II. THE COURT OF APPEALS APPLIED SETTLED PRINCIPLES OF APPELLATE STANDING ESTABLISHED BY THIS COURT AND CONSISTENTLY FOLLOWED BY THE COURTS OF APPEALS.

As we pointed out in opposition to petitioners' prior certiorari petition, the issue raised has already been resolved by this Court. In *Marino v. Ortiz*, 484 U.S. 301, 304 (1988), the Court authoritatively ruled that "only parties to a lawsuit, or those that properly become parties [by intervening], may appeal an adverse judgment . . . ." The Court pointed out that the Federal Rules of Appellate Procedure provide that "[t]he notice of appeal shall specify the *party or parties* taking the appeal." Fed. R. App. P. 3(c) (emphasis added).

Marino affirmed dismissal of an appeal by a group of white police officers who appeared and objected to a proposed settlement of a class action brought by Hispanic members of the New York City Police Department. This Court held that the officers lacked standing to appeal, notwithstanding their participation in the proceedings below, because they "were not parties to the underlying lawsuit, and because they failed to intervene for purposes of appeal." *Id.* at 304.

Following *Marino*, every Court of Appeals to be presented with an appeal from a class action judgment brought by non-party class members has ruled that non-party class members—like petitioners—do not have standing to appeal. *Shults v. Champion International Corp.*, 35 F.3d 1056 (6th Cir. 1994); *Gottlieb v. Wiles*, 11 F.3d 1004 (10th Cir. 1993); *Loran v. Furr's/Bishop's Inc.*, 988 F.2d 554 (5th Cir. 1993); *Croyden Associates v. Alleco, Inc.*, 969 F.2d 675, 679 (8th Cir. 1992), *cert. denied*, 113 S. Ct. 1251 (1993); *Walker v. City of*

Mesquite, 858 F.2d 1071 (5th Cir. 1988); *Shores v. Sklar*, 844 F.2d 1485 (11th Cir. 1988).[6]

Thus, for example, the Eighth Circuit observed that "*Marino* provides substantial support for holding that unnamed class members who object to a settlement must move to intervene, and they will be denied standing to appeal when they have not done so." *Croyden*, 969 F.2d at 679.

In their prior certiorari petition, petitioners argued without success that there is a supposed "split" among the Circuits. Petitioners now reiterate their meritless argument, relying on the same cases as before. However, as we pointed out in opposition to the prior petition, the cases that petitioners cite either were decided prior to *Marino*, or did not directly present the issue.

Not one of the post-*Marino* cases on which petitioners once again rely granted non-party class members standing to appeal from a judgment approving a settlement in a class action or from an order refusing to vacate such a judgment. In *In re VMS Limited Partnership Securities Litigation*, 976 F.2d 362 (7th Cir. 1992), the Seventh Circuit held that non-party class members did *not* have standing to appeal a post-settlement order implementing a settlement agreement. The Court specifically stated that "we offer no opinion" as to whether non-party class members would have standing to appeal from a judgment approving the settlement. 976 F.2d at 368 n.8.

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[6] Petitioners cite *In re Dennis Greenman Securities Litigation*, 829 F.2d 1539 (11th Cir. 1987), a pre-*Marino* case, for the proposition that the Fifth and Eleventh Circuits permit non-party class members to appeal in Rule 23(b)(3) class actions. (Pet. at 16). This contention is specious. In *Greenman*, the issue of standing was not even raised. *See Croyden*, 969 F.2d at 678-79 (discounting the significance of *Greenman*). The Fifth and Eleventh Circuits subsequently held that non-party class members do *not* have appellate standing in Rule 23(b)(3) actions. *Loran*; *Shores*.

Similarly, *Bell Atlantic Corp. v. Bolger*, 2 F.3d 1304 (3d Cir. 1993), cited by petitioners in both of its certiorari petitions, is tangential to the issue raised here. *Bell Atlantic* involved the appellate standing of an objecting shareholder in a shareholders' derivative action. The Court stated that "we need not decide whether different rules apply to objector appellate standing in class and derivative suits." 2 F.3d at 1307 n.4. Subsequently, the Tenth Circuit thoroughly analyzed *Bell Atlantic* and concluded that it was "inapposite" to the appellate standing of non-party class members, who differ from plaintiffs in shareholder derivative suits. *Gottlieb*, 11 F.3d at 1010.[7]

The final post-*Marino* case relied on by petitioners is *Carlough v. Amchem Products, Inc.*, 5 F.3d 707 (3d Cir. 1993), where the Court—without even citing *Marino*—said that class members who timely moved to intervene would be able to appeal from a final judgment. However, unlike this case, *Carlough* was neither an appeal from a final judgment nor an appeal from an order refusing to vacate such a judgment. And, unlike this case, *Carlough* did not involve an appeal by a non-party class member who had failed to make a timely motion to intervene.

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[7] The Tenth Circuit explained why derivative suit cases such as *Bell Atlantic* are not on point:

> "[C]ases holding that an unnamed plaintiff in a shareholder derivative suit under Rule 23.1 has standing to appeal are inapposite. *See, e.g., Bell Atlantic* . . . . Rule 23.1 does not offer the same protective mechanisms offered by Rule 23. Unlike class actions under Rule 23, in shareholder derivative suits under Rule 23.1, a preliminary affirmative determination that the named plaintiffs will fairly and adequately represent the interests of the other class members is not a prerequisite to the maintenance of the action. . . . In addition, there is no opt out provision in shareholder derivative suits."

Gottlieb, 11 F.3d at 1010-11.

Rather, *Carlough* was an interlocutory appeal from the denial of the class members' motion to intervene; the Third Circuit dismissed the appeal on the ground that the denial of the motion to intervene was not immediately appealable. Thus, *Carlough* did not squarely present the issue raised by the petition.

As we pointed out in our opposition to the prior petition, it remains to be seen if the Third Circuit will find non-party class members to have standing to appeal from a class action judgment when that Court is actually presented with such an appeal and is asked to consider the issue in light of *Marino*. At the very least, because the Third Circuit has not yet had occasion to apply *Marino* to an appeal by a non-party class member who failed to file a timely motion to intervene, this Court would benefit by allowing the issue to mature. *See United States v. Mendoza*, 464 U.S. 154, 160 (1984) (noting the benefits of permitting the Courts of Appeals "to explore a difficult question before this Court grants certiorari"); *E.I. DuPont de Nemours & Co. v. Train*, 430 U.S. 112, 135 n.26 (1977) (noting "the wisdom of allowing difficult issues to mature through full consideration by the courts of appeals").

The Tenth Circuit surveyed the very same cases relied upon by petitioners and found that "there is no true conflict." *Gottlieb*, 11 F.3d at 1009. The Court stated: "We hold that standing [of a non-party class member to appeal] is dependent upon a grant of intervention, *a result which we believe to be consistent with the rule in all of the circuits that have directly addressed the issue . . . .*" 11 F.3d at 1006 (emphasis added).

The purported "conflict" described by petitioners in their prior petition, and reiterated here, is an illusion. There is no reason for this Court to grant review.

III. THE DECISION BELOW IS SUPPORTED BY THE TEXT OF THE FEDERAL RULES AND THE POLICIES UNDERLYING THE CLASS ACTION PROCEDURE

The decision below is supported by the language and underlying policies of the Federal Rules of Civil Procedure and the Federal Rules of Appellate Procedure. In *Marino*, this Court relied on the text of the Federal Rules of Appellate Procedure in holding that "only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment." 484 U.S. at 304. As the Court stated, Fed. R. App. P. 3(c) specifically requires that the notice of appeal specify the "party or parties" taking the appeal. *Id.*

This Court applied the same reasoning last Term in *Izumi Seimitsu Kogyo Kabushiki Kaisha v. United States Phillips Corp.*, 114 S. Ct. 425 (1993). There, the petitioner was a nonparty whose motion to intervene was denied by the Court of Appeals. This Court dismissed the writ of certiorari as improvidently granted because the petitioner lacked standing to seek review. The Court explained that the language of the statute creating the certiorari jurisdiction of this Court—28 U.S.C. § 1254(1)—speaks of "the petition of any *party* to any civil or criminal case . . . ." (Emphasis added).

The Sixth Circuit's decision, for which certiorari is sought, is also supported by the language of the class action and intervention provisions of the Federal Rules of Civil Procedure. As we pointed out in opposition to the first petition for certiorari, those provisions make clear that absent intervention, class members are *not* parties to the action, and do not have the unqualified right to participate at every stage of the litigation in the district court and on appeal.

Thus, Rule 23(d) provides that "the court may make appropriate orders . . . requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given . . . of the opportunity of members . . .

to intervene . . . ." The Rule further states that the Court may "impos[e] conditions . . . on intervenors . . . ." As shown by these provisions, the district court has broad discretion under Rule 23 to consider whether, and on what terms, individual class members should be permitted to intervene consistent with the prompt and efficient management of the litigation. If class members were entitled to participate as parties in all aspects of the action even without intervention, then the provisions of Rule 23(d), giving the court authority upon a proper showing to permit *or deny* intervention by class members, and to impose conditions on intervenors, would be superfluous.

Consistent with the language of the Federal Rules, the Advisory Committee Notes on the 1966 Amendments to Fed. R. Civ. P. 24 state that "[a] class member who claims that his 'representative' does not adequately represent him, and is able to establish that proposition with sufficient probability . . . should, as a general rule, be entitled to intervene in the action." Thus, the Federal Rules contemplate that if non-party class members wish to participate as parties in a class action, they must first intervene.[8]

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[8] The Federal Rules distinguish between intervention and "entering an appearance through counsel." Any class member may "enter an appearance through counsel," Fed. R. Civ. P. 23(c)(2). This is not, however, the equivalent of intervention. As Professor Benjamin Kaplan, the reporter to the Advisory Committee, explains:

> "I read this 'appearance' as entitling counsel to receive the papers in the action to enable him to follow the case with a view to deciding, *e.g.*, whether he should move to intervene. If 'appearance' is read as enabling the class member to be admitted automatically into the action as a party, it would stand in odd contrast to intervention in the action under Rule 24, which is not automatic and requires a showing."

Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 Harv. L. Rev. 356, 392 n.137 (1967).

Moreover, automatically permitting all non-party class members to appeal would be impractical and antithetical to the policies and purposes of Rule 23. Rule 23 sets forth a procedure through which common issues can be efficiently litigated in a single suit "when there are too many plaintiffs for proper joinder." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985). The rule seeks to *avoid* unmanageable activity of numerous parties by providing for a " 'representative' suit to which some members of the class are parties, [who] may bind members of the class or those represented who were not made parties to it." *Hansberry v. Lee*, 311 U.S. 32, 41 (1940). As this Court has explained:

> "A federal class action is no longer 'an invitation to joinder' but a truly representative suit designed to avoid, rather than encourage, unnecessary filing of repetitious papers and motions."

American Pipe & Construction Co. v. Utah, 414 U.S. 538, 550 (1974). Accordingly, Rule 23 is structured to provide each class member with "procedural due process protection[s]" without being "fully a party in the traditional sense." *Shutts*, 472 U.S. at 808, 811-12.

The goals of manageability and efficiency would be compromised if each class member could individually decide to appeal. As the Eleventh Circuit explained:

> "A fundamental purpose of the class action is to render manageable litigation that involves numerous members of a homogeneous class, who would all otherwise have access to the court through individual lawsuits. . . . If each class member could appeal individually, the litigation could become unwieldy. Thus, allowing direct appeals by individual class members who have not intervened in the district court *would defeat the very purpose of class action lawsuits*."

Guthrie v. Evans, 815 F.2d 626, 629 (11th Cir. 1987) (emphasis added); *accord Croyden*, 969 F.2d at 678; *Walker*, 858 F.2d at 1074 (a non-party class member may not appeal absent intervention in the court below; "a contrary rule would result in the frustration of the purpose behind class litigation"); *Gottlieb*, 11 F.3d at 1009 ("If individual appeals without formal intervention were to be permitted, the class action would break down under the burden of unpredictable and unlimited individual actions. Such a result would directly conflict with the goals of Rule 23 and would eviscerate the utility of the class action suit.").

The Courts of Appeals have also pointed out that permitting appeals by non-party class members would be inconsistent with the representative nature of class actions. *Croyden*, 969 F.2d at 678; *Walker*, 858 F.2d at 1073; *Guthrie*, 815 F.2d at 628. The problem is underscored by this case. The class representatives, who were determined by the district court to be adequate, are satisfied with the judgment and want its benefits now. Petitioners, who represent no one but themselves, seek to overturn that judgment against the wishes of the class representatives and the overwhelming majority of the class. "It is particularly appropriate" to dismiss an appeal by a non-party class member when the "class member's challenge to the adequacy of a settlement is contrary to the view of all the other class members." *Croyden*, 969 F.2d at 680.

Moreover, automatically permitting appeals by non-party class members without intervention is unnecessary to protect the class members' individual interests. In Rule 23(b)(3) actions, such as this, class members can protect their interests by exercising their right to opt out and pursue their own actions. *Croyden*, 969 F.2d at 678; *Guthrie*, 815 F.2d at 628; *Gottlieb*, 11 F.3d at 1009. Alternatively, if individual class members believe that they are not represented adequately by the class representatives, they can protect their interests by moving to intervene; or they can seek to avoid the effect of an adverse judgment by collateral attack. *Croyden*, 969 F.2d at

678; *Walker*, 858 F.2d at 1073-74; *Guthrie*, 815 F.2d at 628; *Shults*, 35 F.3d at 1058.[9] "With these legal avenues available for individual class members, there is no need to permit an individual to appeal a judgment with which the class representatives, and presumably the majority of the class members are satisfied." *Guthrie*, 815 F.2d at 628; *Croyden*, 969 F.2d at 678.

Petitioners ignore both the language of the Federal Rules and the policies underlying class actions set forth in decisions of this Court and the Courts of Appeals.[10] Instead, petitioners assert incorrectly—as they did in their prior unsuccessful petition—that "an appeal is often the only mechanism by which an absent class member can protect his or her rights." (Pet. at 14). They once again assert that the right to opt out does not provide adequate protection, because class claims are "frequently" too small to justify individual litigation. But neither the Court below nor any other Circuit has held that a class member may never appeal; they merely held that intervention is a precondition. Certainly, any class member with the wherewithal to appeal will also have the wherewithal to file a motion to intervene and assert any basis for contending

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[9] Petitioners are completely off base in arguing that the Sixth Circuit in *Shults* "apparently would allow an unnamed class member . . . standing to appeal if . . . he could prove factually a violation of Fed. R. Civ. P. 23(a)(4) (adequacy of representation)." (Pet. at 17). To the contrary, *Shults* emphasized that claims of inadequacy of representation should be addressed by motions to intervene or collateral attack, and that there is "no persuasive authority for th[e] proposition" that non-party class members should have "standing to appeal, independent of any other grounds, [where] the class representatives afforded them inadequate representation." 35 F.3d at 1058, 1061.

[10] Petitioners rely heavily, as they did in their last certiorari petition, on a law review note, Note, *The Appealability of Class Action Settlements by Unnamed Parties*, 60 U. Chi. L. Rev. 933 (1993). The Tenth Circuit has stated that it "disagree[s] with this student's analysis," *Gottlieb*, 11 F.3d at 1012 n.7, as does every Court of Appeals to have squarely addressed the issue since *Marino* was decided.

that class representation is inadequate. Moreover, petitioners' argument is quite beside the point on the facts of this case: the petitioners *did* have their own pending separate action against the defendants, which they had been pursuing since 1986; they had repeated opportunities to opt out in order to continue pursuing that action; and they chose not to avail themselves of those opportunities.

Next, petitioners state that the intervention requirement will have "the practical effect of drastically limiting the availability of appellate review" of judgments in class actions. (Pet. at 19). The gravamen of petitioners' argument is that motions to intervene will often be denied (a) because the class members are already adequately represented by the class representatives, or (b) because the class members can protect their rights by opting out. (Pet. at 21-22).

Petitioners' generalizations about whether motions to intervene will be granted or denied are speculative at best. In this case, because petitioners failed to file a timely motion to intervene, it is impossible to determine whether the district court would have granted or denied a motion to intervene filed while the court had jurisdiction. Thus, a concrete factual setting is missing, and petitioners are forced to rely on unsupported speculation.

Moreover, when class members are already adequately represented or have alternative means of protecting their rights, there is no reason to give them standing to appeal. Thus, the fact that intervention motions may properly be denied weighs strongly *against* granting non-party class members standing to appeal.

Petitioners also speculate—as they did in their prior petition—that requiring intervention as a prerequisite to appeal "will result in greatly protracted and burdensome class action litigation." (Pet. at 23). But as we pointed out in opposing their prior petition, petitioners' theory is spun from their false assumption that class members would have to move to inter-

vene as soon as they receive notice of the action. *United Airlines, Inc. v. McDonald*, 432 U.S. 385 (1977), holds to the contrary. In that case, this Court held that a motion to intervene solely for purposes of appeal may be timely even if made after judgment. *Accord Marino*, 484 U.S. at 304. Petitioners do not explain why the procedure recommended by this Court would be an undue burden on litigants or the courts. Nor do they present any evidence that the Fifth, Sixth, Eighth, Tenth and Eleventh Circuits, which have all required intervention as a prerequisite to appeal, have encountered anything resembling the parade of horribles that petitioners have conjured up.

In short, the decision below is firmly rooted in the language of the Federal Rules, the decisions of this Court, and the policies that underlie class actions. Petitioners' arguments to the contrary—which largely repeat the arguments of their unsuccessful prior petition—continue to lack merit.

IV. WHERE PETITIONERS' APPEAL FROM A JUDGMENT WAS DISMISSED FOR LACK OF STANDING AND CERTIORARI WAS DENIED, PETITIONERS MAY NOT OVERCOME THEIR LACK OF STANDING BY APPEALING FROM AN ORDER REFUSING TO VACATE THAT SAME JUDGMENT.

As described above, the Court of Appeals dismissed, for lack of standing, petitioners' appeal from the judgment approving the settlement, and this Court denied certiorari. Undaunted, petitioners now argue that they have standing to appeal from an order refusing to vacate that same judgment. Petitioners' position is untenable. If non-parties could overcome their lack of standing to appeal from a judgment simply by appealing from the denial of a motion to vacate that judgment, "[t]he rule that only parties to a lawsuit . . . may appeal an adverse judgment" would be nullified. *Marino*, 484 U.S. at 304.

The cases cited by petitioners do not support their position. To the contrary, the Court in *Kem Manufacturing Corp. v. Wilder*, 817 F.2d 1517, 1520 (11th Cir. 1987), held that "the general rule is that one must either be a party or a party's legal representative in order to have standing to bring any Rule 60(b) motion." The Court pointed out that Rule 60(b), by its very terms, provides that "a 'court may relieve *a party or his legal representative*' from a final judgment." 817 F.2d at 1519-20 (emphasis by the Court).

Kem and some other cases have recognized a narrow "potential exception" in certain circumstances where a non-party brings a motion under the savings clause at the end of Rule 60(b), which states that the Rule "does not limit the power of a court . . . to set aside a judgment for fraud upon the court." But petitioners did not bring any motion under that clause. Rather, their motion specified that it was brought pursuant to Fed. R. Civ. P. 60(b)(2), (3) and (6)[11]—and as noted above, the plain terms of the Rule provide that only "a party or a party's legal representative" may take advantage of those sections.[12]

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[11] The motion stated: "[Movants], by their counsel, hereby move the Court pursuant to Fed. R. Civ. Pro. 60(b)(2), (3) and (6) . . . ." (R. 315).

[12] A motion under Rule 60(b)(3) alleging fraud and misrepresentation is not the same as a motion under the savings clause alleging fraud on the court. As the Federal Circuit recently explained:

> "Rule 60(b) contains two references to fraud. The first is in subsection (3) . . . and the second is in the savings clause . . . [A] motion to set aside a judgment for fraud under subsection (3) must be made within one year . . . . The savings clause, in contrast, contains no time limitation.
>
> In view of the two distinct fraud provisions of Rule 60(b), '[n]ot all fraud is "fraud on the court" ' . . . Indeed, the savings clause of Rule 60(b) 'should be construed very narrowly' because 'the otherwise nebulous concept of "fraud on the court" could easily overwhelm the specific [fraud] provision of 60(b)(3) and its [one-year] time limitation.' " *Broyhill Furniture Industries, Inc. v. Craft-*

Moreover, none of the cases cited by petitioners hold that non-party class members may obtain appellate standing by making a Rule 60(b) motion and using it as a vehicle to renew an appeal that was dismissed for lack of standing. But that is precisely what petitioners are attempting to do. Their meritless allegations of "fraud" are nothing new: as petitioners admit (Pet. at 7), they asserted at the fairness hearing itself that there was "an apparent attempt by the proponents of the settlement to mislead the court and the class." The district court specifically found that the petitioners' Rule 60(b) motion reiterated accusations that the court knew about and took into account in approving the settlement. (App. at 9a-11a, 21a-23a). The Court of Appeals concluded that under these circumstances, petitioners could not use Rule 60(b) as a tool to renew their dismissed appeal: "we do not believe the special nature of the Rule 60(b) motion warrants a different conclusion as to standing in this case where the motion seeks to vacate the very settlement as to which this court earlier concluded the appellants lacked standing to challenge." (Pet. App. at 2a).

In short, after the Court of Appeals dismissed petitioners' appeal from the judgment approving the settlement and certiorari was denied, petitioners should not be permitted to renew their dismissed appeal in the guise of an appeal from the denial of a motion under Rule 60(b).

V. PETITIONERS' NUMEROUS MISFILINGS HAVE CREATED A PROCEDURAL CONTEXT WHICH MAKES THIS CASE UNSUITABLE FOR REVIEW BY THIS COURT

As we pointed out in opposition to the prior petition for certiorari, the unusual procedural posture of this case—which was created by petitioners' numerous mis-filings and is unlikely ever to be repeated—makes it unsuitable for certio-

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master Furniture Corp., 12 F.3d 1080, 1085 (Fed. Cir. 1993) (citations omitted).

rari. "A petition for a writ of certiorari will be granted only when there are special and important reasons therefor." Supreme Court Rule 10.1. As this Court has stated:

> "[T]his Court does not sit to satisfy a scholarly interest . . . . Nor does it sit for the benefit of the particular litigants. . . . . 'Special and important reasons' imply a reach to a problem beyond the academic or the episodic."

Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70, 74 (1955). Therefore, the issue must be of broad importance to the public, not merely to the litigants. *Ticor Title Ins. Co. v. Brown*, 114 S. Ct. 1359, 1362 (1994); *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923).

Petitioners' procedural zigs and zags have created a bizarre set of facts which render the case in its present posture unworthy of this Court's discretionary review:

- Petitioners' appeal from the judgment approving the settlement was dismissed, and certiorari was denied. Having been denied standing to appeal directly from that judgment, petitioners sought to appeal from the denial of a motion to vacate that same judgment. Now, after the Court of Appeals rejected petitioners' machinations, they seek certiorari again. Thus, the procedural posture of the case is most unusual.

- Petitioners decided not to opt out *after* they studied the terms of the proposed settlement. Yet—in repetitive appeals and petitions for certiorari—they seek to overturn a settlement that they deliberately chose to join. Such circumstances, if not unprecedented, are rare indeed.[13]

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[13] Many of the decided cases, including *Guthrie*, *Croyden* and *Walker*, have concerned classes that were certified under Rule 23(b)(2) and thus did not provide class members with the opportunity to opt out. In other cases, such as *Gottlieb*, the class was certified under Rule 23(b)(3) before settlement was reached; thus, the class members did not know the settlement terms when they had to decide whether to opt out.

• Petitioners already had their own separate lawsuit (*Taylor*) pending against defendants in the Pennsylvania Court of Common Pleas, which they had been pursuing since 1986.[14] If petitioners thought that they were "well situated to obtain recoveries" in *Taylor* (Pet. at 3), they were free to opt out and pursue that case. Thus, petitioners' rights were adequately protected; they have not been deprived of any substantive right.

• The district court in this case gave petitioners the opportunity to opt out and *also* object to the settlement at the fairness hearing. Indeed, the court gave petitioners second and third opportunities to opt out *after* their objections were heard. These generous offers—far more than what was required by the Federal Rules—were rejected. Petitioners chose to remain in the class and seek to disrupt and delay the

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[14] Petitioners misstate the course of proceedings in the *Taylor* case. Petitioners waited three years after filing *Taylor* to move for class certification, and have never succeeded in obtaining certification. In 1987, the Pennsylvania Court of Common Pleas *granted* defendants' preliminary objections to the *Taylor* complaint as to all but two claims (intentional infliction of emotional distress and Magnuson-Moss Act warranty claims). Subsequently, defendants were granted summary judgment on all claims, including a claim of intentional misrepresentation, in another Pennsylvania case. *Brinkman v. Shiley, Inc.*, 732 F. Supp. 33 (M.D. Pa.), *aff'd*, 902 F.2d 1558 (3d Cir. 1989); *accord Angus v. Shiley Inc.*, 989 F.2d 142, 147 (3d Cir. 1993). Based on *Brinkman* and other developments in Pennsylvania law—which conclusively negated any cause of action—defendants then moved for summary judgment. The summary judgment motion was pending at the time the settlement below was approved. Petitioners have admitted—contrary to their assertions in the petition for certiorari (Pet. at 3)—that their claims in Pennsylvania probably would not survive summary judgment. (R. 335 at 7; R. 334, Ex. C-1).

> In the eight years since *Taylor* was filed, petitioners have not taken a single deposition. (*See* R. 225, Ex. 4). Petitioners' failure to prosecute the *Taylor* action is due to no fault of defendants: as petitioners have admitted to the Pennsylvania court, defendants' counsel has been "'cooperating' and using its 'best efforts' to facilitate plaintiffs' discovery." (R. 225, Exs. 1-3).

settlement that the class representatives and all other class members desire.

• Due to petitioners' neglect, no record has been developed as to whether a timely motion to intervene would have been granted. Petitioners did not file a motion to intervene until after they had filed a notice of appeal which divested the district court of jurisdiction. If they had filed a timely motion to intervene and intervention had been granted, the question of standing to appeal would never have arisen. If, on the other hand, a timely motion to intervene had been denied, this Court would have had the benefit of the reasons given by the district court for denying the motion. As the case stands, petitioners call upon the Court to assess the issue in a vacuum.

• After the district court regained jurisdiction and denied petitioners' untimely motion to intervene, petitioners failed to appeal from that order. Instead, they moved the district court to reconsider their intervention motion. As a result, petitioners appealed from the denial of their motion to vacate the judgment without bringing up for appeal the denial of their motion to intervene.[15]

In sum, unusual and atypical facts which result from petitioners' procedural maneuvering make this case unsuitable for certiorari review. The latest petition should be denied, as the last one was.

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[15] Petitioners assert that because the time for appeal was about to expire, they "were forced" to appeal from the order refusing to vacate the judgment notwithstanding their failure to appeal from the denial of intervention. (Pet. at 10). This is nonsense. Petitioners could have appealed the denial of their motion to intervene instead of moving for reconsideration; they could have withdrawn their motion for reconsideration and then appealed from the denial of intervention; they could have asked for an expedited ruling on their motion for reconsideration; and they could have asked for an extension of the time to appeal pursuant to Fed. R. App. P. 4(a)(5). They did none of these things.

VI. PETITIONERS' "DUE PROCESS" ARGUMENT WAS NOT RAISED BELOW, IS MERITLESS AND DOES NOT DESERVE REVIEW BY THIS COURT

Petitioners argue that the dismissal of their appeal violated their constitutional right to due process of law. However, this argument was not raised below, and it is settled that "ordinarily, this Court does not decide questions not raised or resolved in the lower court." *Youakim v. Miller*, 425 U.S. 231, 234 (1976); *accord Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981) ("question . . . not raised in the Court of Appeals . . . is not properly before us).[16]

Moreover, petitioners' argument is based on contested factual allegations which this Court is ill-equipped to resolve. Petitioners contend—as they did in their prior petition—that the district court treated them as "*de facto* intervenors." (Pet. at 27). Nothing of the sort took place. Petitioners were treated as objecting class members, no more. At no time did the district court indicate that petitioners were parties to the action, or that they would be treated as intervenors.

In *Marino*, this Court rejected the proposition that appearing at a fairness hearing to object to a settlement—as petitioners did—confers standing to appeal. 484 U.S. at 304. Relying on *Marino*, the Court of Appeals concluded that "merely the interest of unnamed, non-intervening class members in the outcome of the class litigation is insufficient to confer standing upon them, even if they voluntarily make their interests known, through objections, to the district court." *Shults*, 35 F.3d at 1060. One thing is certain: petitioners' assertion that they were treated as "*de facto* inter-

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[16] On page 7 of their brief in opposition to dismissal of their appeal, petitioners included rhetoric that "[d]ue process requires that Appellants not be prejudiced in this Appeal by the procedural peculiarity they had no hand in creating." Such a "vague appeal to constitutional principles does not preserve . . . due process claims." *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 77 (1988).

venors" does not present any serious, broadly applicable issue deserving of this Court's attention.

Petitioners assert that they had a constitutional right to rely on their understanding of two pre-*Marino* Sixth Circuit decisions,[17] which, according to petitioners, "unequivocally . . . held that intervention was *not* required to confer standing on class members to appeal a district court decision approving a settlement." (Pet. at 27). But petitioners' interpretation of those cases was *rejected* by the Sixth Circuit in *Shults*.[18] Plainly, the Sixth Circuit is best positioned to interpret its own decisions. Petitioners' misunderstanding of the law does not raise any issue of general applicability and public importance requiring this Court's review.

Petitioners next argue that their constitutional rights were violated when the Court of Appeals denied their motion to stay the appeal and remand. As the Court of Appeals observed, however, a remand would have served no useful purpose because petitioners were not parties at the time appellate standing is determined—when they filed their notice of appeal. (Pet. App. at 2a).

Petitioners' constitutional argument suffers from another infirmity as well. Petitioners state that *when there is a right to appeal*, that right may not arbitrarily be denied. However,

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17 *See Cohen v. Young*, 127 F.2d 721 (6th Cir. 1942); *Sertic v. Cuyahoga, Lake, Geauga and Ashtabula Counties Carpenters District Council*, 459 F.2d 579 (6th Cir. 1972).

18 *Shults* explained that appellate standing under *Cohen* exists only where "the putative appellant . . . [is] haled into court 'like a defendant who is summoned by process of court' "—a condition that is *not* satisfied by a notice advising class members that they may object to a proposed settlement at a fairness hearing. 35 F.3d at 1060-61. The *Shults* Court went on to explain that appellate standing under *Sertic* exists only when there is an appeal from a denial of a motion to intervene and the Court finds that intervention should have been granted, 35 F.3d at 1060, conditions that are not present here.

there is no right to appeal when an appellant lacks standing to appeal.[19] Petitioners' argument, therefore, is inapposite.

CONCLUSION

It is respectfully requested that the petition for writ of certiorari be denied.

Dated: New York, New York
December 7, 1994

Respectfully submitted,

David Klingsberg
Counsel of Record
KAYE, SCHOLER, FIERMAN,
HAYS & HANDLER
425 Park Avenue
New York, New York 10022
(212) 836-8000

Attorneys for Respondents
Pfizer Inc and Shiley
Incorporated

Of counsel:

James R. Adams
FROST & JACOBS
201 East Fifth Street
Cincinnati, Ohio 45202
(513) 651-6800

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[19] Contrary to petitioners' assertion (Pet. at 28), 28 U.S.C. § 1291 simply grants appellate jurisdiction to the Courts of Appeals. It does not do away with settled principles of appellate standing.